No. 14522

United States Court of Appeals

For the Ninth Circuit

UNITED STATES *ex rel.*
ALEJANDRO RACA ALCANTRA, *Appellant,*

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, *Respondent.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

A. L. WIRIN,
SARAH H. LESSER,
Attorneys for Appellant.

316-317 Second and Cherry Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

No. 14522

United States Court of Appeals

For the Ninth Circuit

NITED STATES *ex rel.*
LEJANDRO RACA ALCANTRA, *Appellant,*

vs.

OHN P. BOYD, District Director, Immigration and Naturalization Service, *Respondent.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

A. L. WIRIN,
SARAH H. LESSER,
Attorneys for Appellant.

16-317 Second and Cherry Building,
eattle 4, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

	Page
risdictional Statement	1
. Statutory provisions believed to sustain jurisdiction	1
. Statute, the validity of which is involved	2
. Existence of jurisdiction	3
oncise Statement of the Case	3
pecification of Errors	5
mmary of Argument	6
rgument	7
I. Congress did not intend to provide for the exclusion of persons, like appellant, lawfully admitted to permanent residence in the continental United States upon their return from Alaska after travel directly to and from Alaska by United States transport facilities in pursuance of their seasonal contractual employment	7
II. Congress does not have the constitutional power to provide for exclusion of aliens who are lawfully admitted to the continental United States when they seek to return after travel directly to and from Alaska in pursuance of their seasonal employment in Alaska	19
III. Appellant was denied a fair hearing	30
IV. Appellant is not an alien	34
onclusion	43

TABLE OF CASES

alzac v. Puerto Rico, 258 U.S. 298	25
arber v. Gonzales, 74 S.Ct. 822	7, 18, 26, 28
ennett v. Hunter, 76 U.S. 326, 336	42
ridges v. Wixon (1945) 326 U.S. 135	6, 23
abebe v. Acheson, 183 F.(2d) 795	34, 41
armichael v. Delaney (C.A. 9) 170 F.(2d) 239, 243	7, 9, 18, 27-28
hae Chan Ping v. United States, 130 U.S. 581, 604-609	22

Pa

Chin Chiu Fong v. Phelan, 181 F.(2d) 589 (C.C.A. 9) 32,
DeLima v. Bidwell, 182 U.S. 1 .....
Downes v. Bidwell, 182 U.S. 244 .....
Fong Haw Tan v. Phelan, 333 U.S. 244 .....
Fourteen Diamond Rings v. United States, 183 U.S. 176 .....
Gonzales v. Williams, 192 U.S. 1 .....15, 25, 34,
Hawaii v. Mankichi, 190 U.S. 197 .....
Head Money Cases, 112 U.S. 580 .....20, 21,
Healy v. Backus (C.A. 9) 221 Fed. 358.....
.....6, 12, 13, 17,
Helvering v. Credit Alliance Corp., 316 U.S. 107.....
Hooven & Allison Co. v. Evatt, 324 U.S. 652, 657....
.....23, 24,
Ikiu v. United States, 142 U.S. 651.....21, 27,
I.L.W.U. et al. v. Boyd (W.D. Wash. 1953) 111 F. Supp. 802 .....
Singh, In re (N.D. Cal. 1913) 209 Fed. 700 12,
Jones v. United States, 137 U.S. 702 .....
Knickerbocker Life v. Norton, 96 U.S. 234, 242 .....
Kwock Jan Fat v. White, 253 U.S. 454 7,
Kwong Hai Chew v. Colding, 344 U.S. 590 .....
.....7, 18, 23, 24, 26,
Lapina v. Williams, 232 U.S. 78 .....
Low Wah Suey v. Backus, 225 U.S. 460, 473 .....
Mackenzie v. Hare, 239 U.S. 299 .....
Mandoli v. Acheson, 344 U.S. 133 .....
Mangaoang v. Boyd (C.A. 9) Appeal No. 13537, June 17, 1953, 205 F.(2d) 553 15,
Matsuda v. Burnett (C.A. 9) 68 F.(2d) 272 .....
Perkins v. Elg, 307 U.S. 325, 334 .....7, 24,36,
Savorgnan v. United States, 338 U.S. 491, 497, 498..
Secretary of Agriculture v. Central Roig. Ref. Co., 338 U.S. 606, 616 .....
Sugimoto v. Nagle (C.A. 9) 38 F.(2d) 207 .....

Page

oyota v. United States, 268 U.S. 402 ..... 15, 25, 34, 39, 40
ruax v. Raich, 239 U.S. 33, 39 ..... 6, 24, 26
nited States ex rel. Harisiades v. Shaughnessy, 342 U.S. 580, 598 36
nited States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 ..... 22, 36
nited States v. Dunton (C.C.A. N.Y.) 297 Fed. 447 33
nited States v. One Ford Coach, 307 U.S. 219, 226 42
nited States v. Raynor, 302 U.S. 540 10
nited States v. Shaughnessy (S.D. N.Y.) 113 F. Supp. 49 ..... 7, 18
nited States v. Wong Kim Ark, 169 U.S. 649, 703.. 36
'ashingtonian Pub. Co. v. Pearson, 306 U.S. 30, 41 42
'ong Yang Sung v. McGrath, 339 U.S. 33; *modified*, 339 U.S. 908 30

STATUTES

ɔrmer 8 U.S.C. 173, 39 Stat. 874, 1917 11
ɔrmer 8 U.S.C. 295, 32 Stat. 176, 33 Stat. 428 12
ɔrmer 8 U.S.C. 297, 32 Stat. 177 12
nmigation and Nationality Act of 1952
Section 235(b) 30
236(a) 31
101(a)(3) 40
101(a)(22) 40
nilippine Independence Act of March 24, 1934, as amended 15, 34, 37, 41
U.S.C. 155(a) 30
U.S.C. 1182(d)(7) 2, 3, 4, 5, 6, 7, 8, 11, 12, 14, 16, 27, 29
3 U.S.C., Sec. 2241 1
3 U.S.C., Sec. 2253 1
4 Stat. 1137 39
2 Stat. 964 1

Pa

62 Stat. 967 .....
64 Stat. 1048 .....
66 Stat. 166, Sec. 101(a)(36) .....
101(a)(15) .....
101(a)(29) .....
101(a)(38) 9,
66 Stat. 175-181 .....
66 Stat. 182 2,
66 Stat. 204 .....

CONSTITUTION

United States Constitution:
Articles I, II, III .....
Fourteenth Amendment .....

---

8 C.F.R. Sec. 235.11 32,
98 Cong. Record No. 69 .....
House Report No. 1365 .....
House Report No. 5678 10,
Senate Report No. 1137 .....
Senate Report No. 2550 .....

United States Court of Appeals
For the Ninth Circuit

NITED STATES *ex rel.* LEJANDRO RACA ALCANTRA, *Appellant*, vs. HN P. BOYD, District Director, Immigration and Naturalization Service, *Respondent.*	No. 14522

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

Statutory provisions believed to sustain jurisdiction.

Jurisdiction of the District Court was invoked under e provisions of Title 28 U.S.C., Sec. 2241, 62 Stat. 4, as amended, particularly as follows:

> "(a) Writs of habeas corpus may be granted * * * district courts * * * within their respective jurisdictions. * * *
>
> "(c) The writ shall not extend to a prisoner, unless he is in custody or by color of authority of the United States. * * *"

Jurisdiction of the Court of Appeals for the Ninth rcuit is invoked under the provisions of Title 28, .S.C. Sec. 2253, 62 Stat. 967, as amended, particurly as follows:

"In a habeas corpus proceeding before a circ
or district judge, the final order shall be subj
to review, on appeal, by the court of appeals f
the circuit where the proceeding is had. * * *"

B. Statute, the validity of which is involved.

Paragraph (7) of subsection 212(d) of the Imm
gration and Nationality Act of 1952, 8 U.S.C. S
1182(d)(7), 66 Stat. 182, provides:

"The provisions of subsection (a) of this s
tion, except paragraphs (20), (21), and (26),
said subsection shall be applicable to any ali
who shall leave Hawaii, Alaska, Guam, Pue
Rico, or the Virgin Islands of the United Stat
and who seeks to enter the continental Unit
States or any other place under the jurisdicti
of the United States: PROVIDED, That persons w
were admitted to Hawaii under the last sente
of Sec. 8(a)(1) of the Act of March 24, 1934,
amended (48 Stat. 456), and aliens who were
mitted to Hawaii as nationals of the United Sta
shall not be excepted by this paragraph from
application of paragraphs (20) and (21) of s
section (a) of this section, unless they belong
a class declared to be nonquota immigrants un
the provisions of Sec. 1101(a)(27) of this ti
other than sub-paragraph (c) thereof, or unl
they were admitted to Hawaii with an immig
tion visa. The Attorney General shall by regu
tions provide a method and procedure for
temporary admission to the United States of
aliens described in this proviso. Any alien
scribed in this paragraph, who is excluded fr
admission to the United States, shall be imme
ately deported in the manner provided by S
1227(a) of this title."

Existence of jurisdiction.

Pre-Trial Order (R. 1-5) states the basis for existence of jurisdiction in that appellant was in custody under color of authority of the United States.

CONCISE STATEMENT OF THE CASE

Appellant was born in the Philippine Islands, an American national, on May 7, 1907. He came to the United States as a permanent resident on February 2, 1928 (R. 1) and has never departed from the United States since that date unless his trips to Alaska in the course of his employment can be considered departures from the United States (R. 1). In 1948 appellant was convicted of the crime of burglary in California. In 1953 appellant went to Alaska to work in the American canneries there, as he had done for many years, and upon his return on August 6, 1953 (R. 2) he was arrested by respondent and exclusion hearings were held looking toward the deportation of appellant from the United States, respondent maintaining that under Section 212(a)(9) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1182(1)), appellant was subject to exclusion from the United States as an alien who had been convicted of a crime involving moral turpitude; and, further, that Section 212 (d)(7) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1182(d)(7)), makes the provisions of Section 212 applicable to any alien who leaves Alaska and seeks to enter the continental United States (R. 3).

Appellant was given no notice of the charge made against him, nor was he furnished an interpreter, al-

though he indicated that he could not read any la guage (Respondent's Exhibit A3) and that he cou speak and understand the English language "Just little bit" (Respondent's Exhibit B1). The Heari Officer concluded that appellant was subject to depor tion and the Board of Immigration Appeals dismiss the appeal (Respondent's Exhibit B23).

Respondent then directed appellant to produce hi self for deportation from the United States whereup the within action was instituted in Federal Distr Court (R. 14).

The court thereupon ruled as a matter of law, a thereby presented the issues now raised on appeal, follows:

(1) That the provisions of Sec. 212(d)(7) of Immigration and Nationality Act of 1952 (8 U.S.C Sec. 1182(d)(7)) apply to lawfully admitted ali who are permanent residents of the United States wh returning to continental United States from the T ritory of Alaska and that such aliens may be exclu from the United States if they come within any the excluding provisions enumerated in Section 2 (a) of said Act (R. 18).

(2) That the provisions of Sec. 212(d)(7) of Immigration and Nationality Act of 1952 (8 U.S.C Sec. 1182(d)(7)) are not limited to aliens seeking enter the continental United States for the first ti (R. 19).

(3) That Congress has the power to and may con tutionally exclude from the continental United Sta certain classes of aliens returning from Alaska v

had previously been lawful permanent residents of the United States (R. 19).

(4) That the hearing accorded appellant satisfied constitutional requirements of procedural due process of law (R. 19).

(5) That the appellant is an alien, being a Filipino who lost his status as a national of the United States on July 4, 1946, by virtue of the proclamation of Philippine Independence (R. 19).

SPECIFICATION OF ERRORS

A. The district court erred in concluding that the provisions of Sec. 212(d)(7) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. Sec. 1182(d)(7)) apply to lawfully admitted aliens who are permanent residents of the United States upon their return to continental United States from the Territory of Alaska and that such aliens may be excluded from the United States if they come within any of the excluding provisions enumerated in Sec. 212(a) of said act.

B. The court erred in concluding that the provisions of Sec. 212(d)(7) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1182(d)(7)) are not limited to aliens seeking to enter continental United States for the first time.

C. The court erred in concluding that Congress has the power to and may constitutionally exclude from continental United States certain classes of aliens returning from Alaska who had previously been lawful permanent residents of the United States.

D. The court erred in concluding that the hearing

accorded appellant satisfied the constitutional requi ments of procedural due process of law.

E. The court erred in concluding that appellant is alien.

SUMMARY OF ARGUMENT

The district court misconstrued congressional tent when it held that subsection 212(d)(7) subject non-citizens who are lawfully admitted to continen United States for permanent residence to the exclusi process upon their return from Alaska. The subs tion properly and consistently interpreted provi only for the potential exclusion of non-citizens w seek to enter continental United States *through* territories. Since 1913, admittance to the territor is only conditional, not unqualified. *Healy v. Back* (C.A. 9) 221 Fed. 358. The instant case, however, volves the status of a person who has been unqualifi ly admitted to the United States, and who has not si that admittance left the jurisdiction of the Uni States.

In any event, if Congress did intend to subject p sons admitted unqualifiedly into the United States the exclusion process, then subsection 212(d)(7) unconstitutional. Once admitted unqualifiedly, n citizens enjoy the status of persons entitled to con tutional guarantees: *Bridges v. Wixon*, 326 U.S. 1 They can travel throughout the United States in p suance of their right to work, which is a right nec sarily included in the right to enter: *Truax v. Ra* 239 U.S. 33. Upon their return from Alaska to mainland they cannot, therefore, be considered as

rant aliens: see, *Barber v. Gonzales*, 74 S.Ct. 822; *wong Hai Chew v. Colding*, 344 U.S. 590; *Carmichael Delaney* (C.A. 9) 170 F.(2d) 239; *United States v. haughnessy* (S.D. N.Y.) 113 F.Supp. 49.

Appellant received no notice of charges against him or was he provided with an interpreter; the record early shows that he is illiterate and only understands nglish "a little bit." Under the circumstances the nstitutional requirements of procedural due process ere not met. *Kwock Jan Fat v. White*, 253 U.S. 454.

Appellant is not an alien. He never "entered" the nited States. He came here as an American national nd never performed any voluntary act to shed that ationality. *Perkins v. Elg*, 307 U.S. 325; Congress has ever acted to denationalize Filipinos residing in the nited States and it should not be assumed that Congress intended to do so by inference.

ARGUMENT

Congress Did Not Intend to Provide for the Exclusion of Persons, Like Appellant, Lawfully Admitted to Permanent Residence in the Continental United States Upon Their Return From Alaska After Travel Directly to and From Alaska by United States Transport Facilities in Pursuance of Their Seasonal Contractual Employment.

The pertinent portion of paragraph (7) of subsection 212(d) of the Immigration and Nationality Act 1952, 66 Stat. 182, provides:

> "The provisions of subsection (a) of this section * * * shall be applicable to any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who

> seeks to enter the continental United States or a other place under the jurisdiction of the Unit States. * * *"

Subsection 212(a), 66 Stat. 182, enumerates t excludable classes of aliens, and is introduced by t language:

> "Except as otherwise provided in this Act, t following classes of aliens shall be ineligible receive visas and shall be excluded from admiss into the United States."

The visas referred to are either immigrant or n immigrant visas. (See sections 203-11 of the Act. Stat. 175-181.)

Subsection 101(a)(15), 66 Stat. 166, defines i migrant alien as "every alien except an alien wh within one of the following classes of non-immigr aliens." House Report, No. 1365, February 14, 19 at pages 36-37, explains the basic distinction betw immigrants and non-immigrants:

> "Aliens who meet the qualitative tests and eligible for admission into the United States classified under existing law as either immigra or non-immigrants. *The immigrant class inclu those aliens who seek to enter the United Sta for permanent residence*, while the non-im grant class includes those aliens who seek to en for temporary periods of stay." (Emphasis s plied)

This definition is in full accord with the prop tion that immigration concerns immigrants and permanent residents; see, *Lapina v. Williams*, 232 U 78. The power to exclude does not extend to pers lawfully resident in the United States, for when "Th

being in legal contemplation no entry, there * * * [can] be no exclusion." *Carmichael v. Delaney* (C.A. 9) 170 F. (2d) 239, 243.

The provisions of subsection 212(d)(7), it is noted, only apply to an alien who "seeks to enter the continental United States."

Subsection 101(a)(131), 66 Stat. 166, defines entry as:

> "* * * any coming of an alien into the United States from a foreign port or place or from an outlying possession. * * *"

The provisions of subsection 212(d)(7), it is noted, only apply to an alien who "seeks to enter the continental United States."

A cursory reading of paragraph (7) of subsection 212(d) might lead to the conclusion that Congress intended to treat any coming of an alien from the territories as an entry into the United States for the purposes of exclusion. If such an interpretation is adopted, however, it immediately raises the problem of an apparent inconsistency in the use and meaning of the term "entry" since an entry is defined as the "coming of an alien * * * from a foreign port or place or from an outlying possession," whereas Alaska and the other territories are not foreign ports or outlying possessions. (The outlying possessions are defined in subsection 101(a)(29), 66 Stat. 166, as "American Samoa and Swain Islands.") Indeed, Alaska, and the other territories enumerated in subsection 212(d)(7) are defined as part of the United States, in the geographical sense, in subsection 101(a)(38), 66 Stat. 166.

Assuming, however, that there is no inconsisten between subsection 212(d)(7) and the definition the term "entry", see, *Helvering v. Credit Allian Corp.* 316 U.S. 107: *United States v. Raynor*, 302 U. 540, the import of subsection 212(d)(7) should be provide for the exclusion of aliens resident in the ter tories who seek to acquire permanent residence in t continental United States "from a foreign port or pla or from an outlying possession" *via* one of the ter tories.

An examination of the legislative history of the pa agraph confirms this latter interpretation. The ori inal version, S. No. 2550, p. 66, and H.R. No. 567 p. 36, provided as relevant:

> "The provisions of subsection (a) of this s tion * * * shall be applicable to any alien who sh leave *the Canal Zone*, Hawaii, Alaska, Gua Puerto Rico, or the Virgin Islands of the Unit State, *or any outlying territory or possession the United States*, and who seeks to enter the c tinental United States or any other place und the jurisdiction of the United States. * * *" (E hasis supplied)

The italicized portion is that which was deleted Congress before final passage. The reason for the letion seems obvious, since, to retain that langua would render the subsection redundant in view of t definition of "entry", which itself subjects travel fr the deleted areas to the exclusion provisions of the A that is, there would be a direct entry into the con nental United States from those areas, rather than entry *through a* territory of the United States. T

act that the Canal Zone and the outlying possessions ppear in the original bills apparently was the result f the ancestry of the provision. Former 8 U.S.C. 173, 9 Stat. 874, passed in 1917, is specified by *the House eport, supra,* at pages 144-145, as the immediate pre- ecessor to subsection 212(d)(7). It provided:

> "The term 'United States' shall be construed to mean the United States, and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone; but if any alien shall leave the Canal Zone or any insular possession of the United States and attempt to enter any other place under the jurisdiction of the United States, nothing contained in this chapter shall be construed as permitting him to enter under any other conditions than those applicable to all aliens."

This legislative genesis is more important, however, ue to the fact that (as stated in House Report, *supra,* page 53, and Senate Report, No. 1137, January 29, 952, at p. 14):

> "Section 212(d)(7) of the bill continues in effect the special procedures applicable to aliens who travel from the Panama Canal Zone, territories, or outlying possessions to the continental United States or any other territory under the jurisdiction of the United States. Under the bill such procedures will also be applicable to aliens traveling from Alaska to the continental United States. * * *"

It should be noted that the reports state that the aragraph applies to aliens who *travel from,* rather an *return from,* the territories to the continental nited States.

The former law drew the distinction between t continental U. S. and the insular territories. The l ter category includes Hawaii, but not Alaska; see f mer 8 U.S.C. Sec. 297, 32 Stat. 177: see, former 8 U. C. Sec. 295, 32 Stat. 176, 33 Stat. 428, since Alas was considered to be part of the mainland. Under t present law however, Congress recognizes three ca gories of American territory; the continental Unit States, the territories (including Alaska), and the o lying possessions (which for purposes of entry a treated as foreign ports). This fact explains w the reports state that only travel from Alaska is m ified by subsection 212(d)(7).

A further examination of the historical backgrou of subsection 212(d)(7) moreover, discloses that t rationale behind the exclusion of aliens coming to t continental United States from the insular territor has been the theory that the original entry into t territories is only *conditional*, and not one permitti automatically, an unqualified entry into the contin tal United States.

The cases of *In re Singh* (N.D. Cal.) 209 Fed. 7 and *Healy v. Backus* (C.A. 9) 221 Fed. 358, invol the validity of amended paragraph (3) of Rule of the 1913 regulations of the Commissioner Gene of Immigration, which provided (as quoted in *Healy* case, *supra*, at 362):

> "That aliens applying at continental ports a surrendering the certificate above described sh upon identification, be permitted to land, pro ed it appears that at the time such aliens w admitted to the Philippines they were not m

bers of the excluded classes or likely to become public charges if they proceeded to the mainland."

In discussing this rule, the Court of Appeals pointed out in the *Healy* case, *supra*, at 362-363:

"* * * The amended rule discards the idea that aliens once admitted to insular possessions are entitled as of course to admission to the continent without further examination, and has injected the thought that aliens might be likely to become a public charge on the mainland when such likelihood would not exist as to them in the insular possessions, and hence they are subject to further examination upon their entry at continental ports."

Regarding the basis for the new rule, the District Court in the *Singh* case, *supra*, stated at 703-4:

"There may be reasons for rejecting an alien at continental ports which would not exist if he were applying to enter the Philippines. * * * A more rigid test may therefore well be applied to those seeking admission to the mainland than that applied to those seeking admission to the Philippines."

The Court of Appeals in the *Healy* case, *supra*, at 363, agreed:

"* * * Why is it not a reasonable and perfectly natural * * * [practice] to admit such persons to the insular possessions on condition that if they proceed to the mainland they must submit to further examination as to their likelihood of becoming public charges in the latter country? It is but the application and enforcement of the act according to the conditions found to exist, and is not, we think, beyond the authority conferred by Con-

gress. *The admission to the insular possessio under the amended Rule 14 is not an admissi generally, but only qualifiedly and conditionall so that applicant's exclusion from the contine may yet proceed upon the ground that he is o of the excluded classes, and not upon the grou of having, after entry, become a public char for causes theretofore existing after unqualifi admission.*" (Emphasis supplied)

Thus, the exclusion of aliens who seek to enter t continental United States for permanent residen from the insular territories was upheld precisely b cause the original entry into the insular territori was not an unqualified admission into the Unit States generally. See also: *Matsuda v. Burnett* (C. 9) 68 F.(2d) 272; *Sugimoto v. Nagle* (C.A. 9) F.(2d) 207.

This conditional entry theory is not only totally co sistent with the proposed interpretation of the insta provision, indeed from an examination of the congr sional debates it becomes clear that it was the theo which guided Congress in its passage of subsection 2 (d)(7).

On April 14, 1952, as reported in 98 Cong. R. M 69[1] the proposed act was opened for amendment t the House of Representatives. Mr. Farrington, de gate from Hawaii, introduced the following additi to the proposed definition of the phrase "lawfully a mitted for permanent residence" in paragraph (2 of the subsection 101(a):

"Persons who were admitted to Hawaii und

[1]Page references hereafter are to this issue of the C gressional Record.

> the last sentence of section 8(a)(1) of the Act of March 24, 1934, as amended (48 Stat. 456), shall be deemed to have been lawfully admitted for permanent residence." (page 4468)

The act referred to is the Philippine Independence ct which subjected Filipinos who came to the main- ind after 1934 to the immigration laws. As nationals ney could before then come to the continental United tates without restrictions: see, *Toyota v. United tates*, 268 U.S. 402; *Gonzales v. Williams*, 192 U.S. : *Mangaoang v. Boyd* (C.A. 9) 205 F.(2d) 553. The last sentence" referred to, exempted from immigra- on restrictions those Filipinos who only sought entry ito Hawaii. Thus the proposed addition would have iade those Filipinos who came to Hawaii unrestrict- d by the immigration laws, permanent residents of ie United States.

Mr. Walter, the co-author of the act, concluded his rgument against the addition as follows:

> "* * * to adopt the amendment, by so doing, you are saying, 'You can come to the mainland,' and I do not think we ought to do that." (page 4469)

This comment is vitally significant, for it is a clear xpression of Mr. Walter's opinion that if an alien is a *ermanent resident* of the United States, *residing in Iawaii, he cannot be prevented from traveling to the ontinental United States.*

The amendment was rejected, but later on the same ay Mr. Farrington, as a companion proposal, intro- uced the following substitution for the pertinent pro- isions of subsection 212(d)(7):

> "The provisions of subsection (a) * * * shall l applicable to any alien who shall leave the Can Zone, Guam, Puerto Rico, or the Virgin Islan of the United States or any outlying territo or possession of the United States, other tha Hawaii or Alaska, and who seeks to enter tl continental United States. * * *" (page 4471).

The debate on the proposed amendment again co firms the suggested interpretation. Mr. Farringt stated in support of the amendment:

> "The purpose of this amendment is to gi aliens who now enjoy the status of permane residents of the Territory of Hawaii the status permanent residents of the United States.
>
> "The practical result of the adoption of th amendment would be to provide for aliens in H waii who are permanent residents the same pri ilege of travel to the States and among the Stat that is permitted to aliens who are permane residents of the States." (page 4472)

Mr. Walter in reply to this argument did not ch lenge the underlying thesis that permanent reside of the United States are unaffected by the section. stated, in part:

> "* * * It is important to bear in mind the fa that there are a great many aliens in Hawaii w have never been properly screened. There th are, and if this amendment is adopted they wo come to the United States without any furth screening and could remain here. * * * It is e tirely a question of aliens coming to the Unit States, and I for one do not think that they sho be admitted whether they come from Hawaii whether they come from Europe, without bei

screened in order to determine whether or not they are subversive."[2] (page 4473)

"The only thing under this law that is required of them is an additional screening when they arrive at the Pacific Coast in order to determine whether or not they are admissible under the general immigration laws of the United States; that is all." (page 4473)

The tenor of Mr. Walter's argument is markedly eminiscent of the discussion in *Healy v. Backus, supra.*

To recapiulate the history of restrictions upon entry rom the territories: In 1913, by regulation, the prac- ice of admitting aliens into the continental United tates automatically upon proof of lawful admittance nto the insular territories was abandoned for the prac- ice of making the original entry into the territory con- itional only, subjecting the alien who seeks entry into he continental United States to further exclusion pro- eedings. This procedure was upheld, in 1915, upon he conditional entry theory, in *Healy v. Backus, supra.*

In 1917, Congress legislated generally on the sub- ect, but did not restrict travel of aliens from Alaska, vhich at that time was treated as part of the conti- ental United States.

In 1952, Congress provided that admittance from laska should likewise be conditional, no longer en- itling aliens with such residence to admittance to the ontinental United States as a matter of right.

---

[2] These comments are consistent with the proviso in sub- ection 212(d)(7) which withholds from Filipinos vho entered Hawaii unrestricted by the immigration aws the exemption from the visa-exclusion provisions f paragraphs (20) and (21) of subsection 212(a).

Appellant herein, however, is a non-citizen who h already been unqualifiedly admitted to the contine tal United States for permanent residence; he is nc therefore, an immigrant seeking to come to the mai land; see *Barber v. Gonzales*, 74 S.Ct. 822.

The mere fact that his employment requires hi to travel to the territory of Alaska does not alter t nature of his original entry, or his status as a re dent of the United States: see *Kwong Hai Chew Colding*, 344 U.S. 590; *Carmichael v. Delaney, supr* In *United States v. Shaughnessy* (S.D. N.Y.) 113 Supp. 49, after the mandate of this court in the *Che* case had been returned, Chew brought a supplement writ of habeas corpus to test the validity of the D trict Director's denial of bond pending his hearir The District Court ordered Chew released, and state referring to the decision of *Kwong Hai Chew v. Co ing, supra*, at 53:

> "[The] * * * underlying rationale appears be that the circumstances of his employment a seaman on a ship of American registry did r break the continuity of his permanent reside so as to deprive him of those rights which cle ly be enjoyed as an alien resident on terra firm

It should be noted that the departure from the c tinental United States in the *Chew* and *Carmich* cases involved travel to foreign ports and territo Here, however, *the travel* involved *is within the Unit States after unqualified admission into the Unit States.* In the words of Representative Walter, a permanent resident of the United States "[he] c come to the mainland."

Thus, the District Court erred when it concluded in *I.L.W.U. v. Boyd*, 111 F.Supp. 802, that the exclusion provisions of subsection 212(a) applies to appellant and others in like situation because "The words 'any alien' include aliens situated as are those here involved," *International Longshoremen's and Warehousemen's Union v. Boyd* (W.D. Wash.) 111 F.Supp. 802, 806. Such a conclusion fails to appreciate that the words "any alien" are modified by the phrase "who seeks to enter the continental United States." The alien involved herein, however, is not seeking to enter the United States; he is already lawfully admitted for permanent residence.

It should be noted that the District Court in the instant case referred to and adopted throughout the reasoning and decision of the three judge court in its *per curiam* decision in the case of *International Longshoremen's and Warehousemen's Union, Local 37 et al. v. Boyd, etc.*, 111 F.Supp. 802 *et seq.* (R. 7).

I. Congress Does Not Have the Constitutional Power to Provide for the Exclusion of Aliens Who Are Lawfully Admitted to the Continental United States When They Seek to Return After Travel Directly to and From Alaska in Pursuance of Their Seasonal Employment in Alaska.

The court concluded as regards the constitutional issues here presented, in *International Longshoremen's and Warehousemen's Union v. Boyd*, 111 F.Supp. 802, at 807:

> "* * * Keeping clearly in mind the vast and broad powers of Congress to enact legislation excluding or expelling aliens as balanced against

> the limited constitutional rights of all aliens, i
> cluding lawfully admitted resident aliens of co
> tinental United States, we cannot hold that th
> portion of the statute under attack offends or
> beyond the constitutional authority vested in Co
> gress even though its provisions make applicab
> restrictions upon aliens leaving the territories
> the United States, including Alaska, and ente
> ing or reentering other territories, states or plac
> under United States jurisdiction when not appli
> able to aliens permanently resident in or trav
> ing within or between the states. Neither are v
> aware of any constitutional limitation upon t
> power of Congress which would forbid its clas
> fication in the same category, for the purpose
> exclusion, lawfully admitted aliens permanent
> residing in continental United States when see
> ing reentry into the states from a territory of t
> United States, and similarly situated aliens see
> ing reentry to the United States from a forei
> land."

The first relevant inquiry, therefore, is: What
the nature and source of the exclusion power? In t
early *Head Money Cases*, 112 U.S. 580, the power
Congress to impose a head tax upon the ship compani
for every alien brought into the United States w
challenged; this court, identifying the power employe
stated, *supra*, at 595:

> "* * * The power exercised in this instance is n
> the taxing power. The burden imposed on t
> ship owner by this statute is the mere incident
> the regulation of commerce, of that branch of f
> eign commerce which is involved in immigratio

Having established the constitutional source of t

power to regulate immigration, the opinion concluded, *supra*, at 600:

> "* * * Congress having the power to pass a law regulating immigration as a part of the commerce of this country with foreign Nations, *we see nothing in the statute by which it has here exercised that power forbidden by any other part of the Constitution.*" (Emphasis supplied)

The italicized portions from the opinions in the *Head Money* and *Chinese exclusion* cases, demonstrate that, from the earliest judicial consideration of the exclusion power, it has never been argued or assumed that the power was unrestricted. *The power to exclude is a sovereign power,* but one arising from the power delegated to Congress to regulate foreign commerce, and which *is limited by the Constitution.*

In the leading case of *Ikiu v. United States*, 142 U.S. 51, these concepts were restated, *supra*, at 659, as follows:

> "It is an accepted maxim of international law, that every sovereign nation has power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. * * * In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the Constitution has conferred power to regulated

commerce with foreign nations, including the e
trance of ships, the importation of goods and t
bringing of persons into the ports of the Unit
States; to establish a uniform rule of naturaliz
tion; to declare war, and to provide and mai
tain armies and navies; and to make all la
which may be necessary and proper for carryi
into effect these powers and all other powers ve
ed by the Constitution in the government of t
United States or in any department or offic
thereof. U.S. Const. art. 1, & 8; *Head Money Cas*
112 U.S. 580; *Chae Chan Ping v. United Stat*
130 U.S. 581, 604-609."

Thereafter, *supra*, at page 660, the opinion amp
fied the limitations upon the exclusion power:

"* * * It is not within the province of the j
diciary to order that *foreigners who have nev*
been naturalized, nor acquired any domicile
residence within the United States, nor even be
admitted into the country, pursuant to law, sh
be permitted to enter, in opposition to the cons
tutional and lawful measures of the legislati
and executive branches of the national gove
ment. *As to such persons, decisions of executi*
or administrative officers acting with powers
pressly conferred by Congress, are due process
law." (Emphasis supplied)

These concepts were recently reaffirmed in *Uni*
States ex rel. Knauff v. Shaughnessy, 338 U.S. 537,
543:

"Thus the decision to admit or to exclude
alien may be lawfully placed with the Preside
who may in turn delegate the carrying out of t
function to a responsible executive officer of
sovereign, such as the Attorney General. The
tion of the executive officer under such author

is final and conclusive. *Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court,* unless expressly authorized by law, to review the determination of the political branch of the government to exclude a given alien." (Emphasis supplied)

When Congress exercises the commerce power in elds other than immigation, it is clear that "resort to he Commerce Clause can [not] defy the standards of ue process." *Secretary of Agri. v. Central Roig. Ref. o.*, 338 U.S. 606, 616.

Moreover, and more important to the issues involved erein, the status of imports (immune from state taxtion) survives only "until they are sold, removed rom the original package, or put to the use for which hey are imported." *Hooven & Allison Co. v. Evatt*, 324 J.S. 652, 657. In other words, once goods are merged ith the general mass of goods within the United tates they lose their status as imports. Similarly, nce aliens have lawfully acquired permanent resience, they cease, in the constitutional sense, to be mmigrants. They may be deported pursuant to law, ut they have become "invested with rights guaranteed y the Constitution to all people within our borders. uch rights include those protected by the First and ifth Amendments and by the due process clause of he Fourteenth Amendment," *Bridges v. Wixon*, 326 J.S. 135, Justice Murphy concurring at 161, and quotd with approval in *Kwong Hai Chew v. Colding*, 344 J.S. 590, 596-597 (footnote 5). Their "status as * * * erson[s] within the meaning and protection of the

Fifth Amendment cannot be capriciously taken fro
[them]." *Kwong Hai Chew v. Colding*, *supra*, at 60

Once an alien is "admitted to the United States u
der the Federal law * * * [he is] admitted with th
privilege of entering and abiding in the United State
and hence of entering and abiding in any state of th
Union." *Truax v. Raich*, 239 U.S. 33, 39.

Paragraph (38) of subsection 101(a), 66 Stat. 16
defines United States as:

> "* * * except as otherwise specifically herein pr
> vided, when used in a geographical sense * *
> the continental United States, Alaska, Hawai
> Puerto Rico, Guam, and the Virgin Islands
> the United States."

Paragraph (36) of subsection 101(a), 66 Stat. 16
provides:

> "The term 'State' includes (except as used
> section 310(a) of title III [not involved herein
> Alaska, Hawaii, the District of Columbia, Puer
> Rico, Guam, and the Virgin Islands of the Unit
> States."

Thus, while it is true, as is stated in *Hooven & A
lison Co. v. Evatt*, *supra*, at 671-672:

> "The term 'United States' may be used in a
> one of several senses. It may be merely the nam
> of a sovereign occupying the position analogo
> to that of other sovereigns in the family of n
> tions. It may designate the territory over whi
> the sovereignty of the United States extends,
> it may be the collective name of the states whi
> are united by and under the Constitution."

it is clear that when dealing with the status of alie
lawfully admitted for permanent residence, the te

'United States" is used in the sense of "the territory over which the sovereignty of the United States extends."[3] See *Toyota v. United States*, 268 U.S. 402;

Although Congress can regulate the territories free of the constitutional restrictions regarding legislation for the States; see, e.g., *Downes v. Bidwell*, 182 U.S. 244; *Hawaii v. Mankichi*, 190 U.S. 197; *Balzac v. Puerto Rico*, 258 U.S. 298; when it deals with the status of resident aliens, it is subject to constitutional restrictions. The instant provision, as interpreted, is *a restriction on the status and rights of persons to travel, work and remain within the territorial limits of the United States; it is not merely the regulation of the territories.*

Under present statutes, for example, aliens who have been convicted of a single crime involving moral turpitude prior to entry are excludable (Section 212 (a)(9), 66 Stat. 182), whereas, to be expellable, the crime must have been committed within five years of the last entry (Section 241(a)(4), 66 Stat. 204). Moreover, even if the non-citizen gains admittance upon his return from Alaska, if the return is treated as a new *entry*, new possibilities for expulsion may arise because of the temporal proximity of the later "entry" to acts which may be committed in the future. Thus there would be a substantial change of status in any event.

---

[3] This meaning is also indicated by subsection 212(d)(7) itself, since its provisions cover travel from the territories to "the continental United States *or any other place under the jurisdiction of the United States.*" *Gonzales v. Williams*, 192 U.S. 1.

The appellant herein enjoys employment rights, pu
suant to a lawful collective bargaining contract n
gotiated by his Union, in the territory of Alask
which constitutes the source of a substantial portio
of his yearly income. Providing for the exclusion
persons like petitioner who could not otherwise be e
pelled, and see *Mangaoang v. Boyd*, 205 F.(2d) 55
cert. denied, 346 U.S. 876) and *Barber v. Gonzale*
supra, if they travel to Alaska, is tantamount to pr
viding for the forfeiture of their job rights heret
fore enjoyed there. To deny such job opportunities
"tantamount to the assertion of the right to deny the
entrance and abode, for in ordinary cases *they ca
not live where they cannot work.*" *Truax v. Raic
supra*, at 42 (Emphasis supplied).

In *Kwong Hai Chew v. Colding*, *supra*, at 592, t
facts relevant to residence and employment were:

> "* * * the resident alien is a seaman, he current
> maintains his residence in the United States a
> usually is physically present there, however,
> is returning from a voyage as a seaman on a ve
> sel of American registry with its home port
> the United States, that voyage has included sche
> uled calls at foreign ports in the Far East. * *

The court thereafter stated *supra*, at 600:

> "* * * the constitutional status which petitio
> er indisputably enjoyed prior to his voyage * *
> [was not] terminated by that voyage. From
> constitutional point of view, he is entitled to d
> process without regard to whether or not, for i
> migration purposes, he is to be treated as an e
> trant alien, and we do not now reach the qu
> tion whether he is to be so treated."

and also commented, *supra*, at 598-599:

"* * * we interpret this regulation as making no attempt to question a resident alien's constitutional right to due process. Section 175.57(b) uses the term 'excludable' in designating the aliens to which it applies. That term relates naturally to entrant aliens and to those assimilated to their status. The regulation nowhere refers to the expulsion of aliens, which is the term that would apply naturally to aliens who are *lawful permanent residents physically present within the United States.*" (Emphasis supplied)

Paragraph (7) of subsection 212(d), as interpreted, provides, in any event, that resident aliens whose employment requires that they travel to Alaska (as distinguished from foreign ports) be "treated as * * * entrant alien[s]" upon their return, despite the fact that they have never left the territory of the United States. We are thus confronted with a far more compelling example of the issue left in doubt in the *Chew* case, *supra.*

If the status of permanent resident alien, which "cannot be capriciously taken," and which, if taken, deprives one "of all that makes life worth living," has any substantial significance, *it must survive travel within the United States in pursuance of one's employment*, a right which is necessarily included in the right to enter the United States: *Truax v. Raich*, *supra.*

The power to exclude, as has been seen, is derived from the power to regulate foreign commerce: *Head Money Cases*, *supra*: *Ikiu v. United States*, *supra.* Thus the requirement of an entry into the United States becomes a pre-condition to exclusion: *Carmi-*

chael v. Delaney (C.A. 9 170) F.(2d) 239, is not mer
ly a statutory precondition, but is, in fact *the const*
tutional precondition to exclusion. Appellant can
to the United States as an American national on a
American ship. He worked in Alaska in America
canneries, going to and from Alaska in the course
his employment, in American ships and planes. H
never "entered" the United States in the statuto
sense; *Barber v. Gonzales, supra,* it is apparent th
congressional power to exclude appellant and othe
of his status cannot arise from the power to regula
foreign commerce. Thus the essential question i
Does an alien enter, in the constitutional sense, up
his return from Alaska to his permanent residen
on the mainland, when he has never left the territo
of the United States?

We are not, it must be emphasized, dealing wi
the rights of "foreigners who have never * * * a
quired any domicile or residence within the Unit
States." *Ikiu v. United States, supra.* Nor are we de
ing with inanimate goods, which may constitutiona
be considered imports although their origin of tran
is the territories and not foreign ports: see *Hoov*
& Allison Co. v. Evatt, supra. We are concerned wi
the status of a person lawfully admitted to the Unit
States for permanent residence who has never l
"the territory over which the sovereignty of the Unit
States extends."

When the power to exclude was challenged in *He*
v. Backus (C.A. 9) 221 Fed. 358, the alien havi
acquired lawful residence in the territories, the
clusion was upheld because the alien had only ma

onditional entry, and thus did not have to be expelled. The court stated, *supra*, at 363:

> "* * * The admission is not an admission generally, but only qualifiedly and conditionally, so that applicant's exclusion from the continent may yet proceed upon the ground that he is one of the excluded classes and not upon the grounds of having, after entry, become a public charge for causes theretofore existing after unqualified admission."

The necessary and assumed converse of this rule s obvious: once an alien has obtained unqualified dmission into the United States generally he may ravel throughout the territory of the United States ithout fear of being excluded.

The Supreme Court was doubtful whether there as an entry, in the constitutional sense in the *Chew* ase, where the alien's claim to continuous residence ithin the United States was based only on service n a vessel of American registry. If doubts exist under those circumstances, surely no doubt can exist here there is actual, contniuous physical residence ithin the United States. To hold otherwise is capriiously to deprive the resident alien of his right to emain, travel and work within the United States; or, in actuality he would be *expelled* by the facile, emantic technique of labeling the expulsion an exlusion.

It is therefore submitted that subsection 212(d) 7) of the Immigration and Nationality Act, as inerpreted and applied by respondent and his agents, ransgresses the constitutional powers of Congress to egulate foreign commerce.

III. Appellant Was Denied a Fair Hearing.

The United States Supreme Court in *Wong Yang Sung v. McGrath*, 339 U.S. 33, modified, 339 U.S. 908 (1950) held that the hearing procedures of the Administrative Procedures Act were applicable to deportation hearings. Congress then passed an Act, 64 Stat. 1048 (1950), 8 U.S.C. Sec. 155a (Supp. 1952), specifically exempting deportation proceedings from the A.P.A. provisions. It is significant, however, that the court in *Wong Yang Sung v. McGrath*, *supra*, at page 50 discussed the possibility of such a course and held that it might be unconstitutional, stating "it might be difficult to justify" exempting deportation proceedings from the Administrative Procedures Act because the tribunal in that case would fail to meet "at least currently prevailing standards of impartiality." The court later, in *Kwong Hai Chew v. Colding*, *supra*, was even more definite, stating, at page 600:

> "From a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien, and we do not now reach the question whether he is to be so treated."

It thus appears that appellant at the very minimum was entitled to a fair hearing with all of the safeguards of due process.

The sections of the Immigration and Nationality Act of 1952 which apply to special inquiry hearings are:

> Section 235(b) "Every alien (other than a alien crewman), and except as otherwise provided in subsection (c) of this section and in section 273(d), who may not appear to the exami

ing immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer. The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien, whose privilege to land is so challenged, before a special inquiry officer for further inquiry."

Sec. 236(a) "A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under Sec. 235 shall be allowed to enter or shall be excluded and deported. The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 235 and 287(b), and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative pres-

> ent, under such conditions as may be prescribe by the Attorney General. A complete record o of the proceedings and of all testimony and evi dence produced at such Inquiry, shall be kept.

It may be seen that few of the details of the hear ing procedure are delineated in the statute. For in stance, nothing is said in the statute about a notice o charges. The pertinent regulations, 8 Code Fed. Reg Sec. 235.11, indicate that if an alien is to be detaine for further inquiry, he must receive a "Notice to Alie Detained for Hearing by Special Inquiry Officer (Form I-122) the regulation goes on to state:

> "If the alien is unable to read or understan the notice, it shall be read and explained to hi by an employee of the Service, through an inte preter, if necessary, prior to the further inquir before the Special Inquiry Officer."

Appellant was entitled to notice of the nature of th charges brought against him; such knowledge is a essential of a fair hearing; *Chin Chiu Fong v. Phela* 181 F.(2d) 589 (C.C.A. 9 1950). From the reco it is apparent that appellant received no such n tice and because of this deficiency, appellant was u aware of the danger which faced him. Although a pellant did receive Form I-122 (which in form is printed strip of paper which looks quite insignificant (See R. Respondent's Exhibit B-8), the Regulatic quoted, *supra*, was violated in that the notice was n explained to him in any way prior to the hearing.

The whole content of the record of the hearing i dicates that appellant had no understanding of t nature of the hearing. Appellant cannot read in a

nguage (R. Respondent's Exhibit A-9), speaks Eng-
sh very poorly and understands everyday English
a very limited way. He indicated that at the be-
inning of the hearing:

"Q. Do you speak and understand the English language?

A Just a little bit."

The inquiry officer chose to disregard the answers
f appellant and to continue to ask him questions
ouched in the legal and techincal terms that could
ot be understood by many native-born Americans
ith much more formal education than petitioner.

The courts have held there is an affirmative duty
inform the non-citizen of his rights. *U. S. v. Dun-
n* (C.C.A.N.Y. 1924) 297 Fed. 447. The Code of
ederal Regulations, Code Fd. Regs. Sec. 236.11,
ates:

"* * * If the alien is not represented by an attorney or representative, the special inquiry officer shall advise the alien of his rights, as described in this section, and shall assist the alien in the presentation of his case. * * *"

It is clear that the inquiry officer in the instant case
aving ascertained that appellant could understand
nglish "only a little bit" and could not read or write
any language, had an affirmative duty to see that
n interpreter was obtained. He also had an affirma-
ve duty to stay proceedings until appellant could
btain assistance.

If an administrative hearing is to be more than a
rmalistic ritual, it must be fair at least as judged
administrative standards. *Kwock Jan Fat v. White*,
53 U.S. 545 (1920); *Chin Chiu Fong v. Phelan, supra.*

It is submitted that appellant did not receive fair hearing in that he was not presented with a stat ment of charges; he did not have an interpreter an was not adequately informed of his rights.

IV. Appellant Is Not an Alien.

The all-embracing issue before this court is whetl er the appellant is now an alien. Obviously, if he not an alien, the deportation proceeding against hi must fall. Concededly, he was not an alien at any tin in his life prior to July 4, 1946. He was born a n tional of the United States alone. He at no time ha dual nationality. American nationality was his birt right. *Toyota v. United States*, 268 U.S. 402; *Go zales v. Williams*, 192 U.S. 1.

The contention is, however, that by virtue of t United States- Philippine Independence Treaty a the Presidential Proclamation of July 1946, *supra*, t appellant was divested of his nationality and ther upon cloaked with alienage. It presently rests up the rationale of the court in the case of *Cabebe v. Ac eson*, 183 F.(2d) 795, wherein it was declared:

> "* * * the Philippine Islands came to the Unit States by cession. And by such acquisition ma individuals became nationals of the United Stat Later, the United States relinquished sovereign over them and their country. It follows Filipi nationals of the United States inhabiting the land at the date of such relinquishment lost t status of nationality. The narrower question f lows: Does such loss also occur as to Filipi nationals of the United States domiciled in t United States? * * *" (p. 880)

"* * * The status of United States nationality for Filipinos was the direct result of the United States' assumption of sovereignty over the Islands. When the United States relinquished its sovereignty, there remained no basis for such status.

"The United States had it desired it, could have provided that Filipinos permanently residing in the United States would not lose their United States nationality upon the recognition of Philippine independence. * * *

"The question is not directly answered (but, as we think, it was inferentially answered) * * * there is no special reference of inclusion or exclusion in any of these acts to Filipinos who were no longer residing in the islands on the date of their independence, * * *." (p. 801)

"* * * It is our conclusion that the United States government intended the status of Filipinos, regardless of domicile or place of residence at the date of Philippine independence, to be entirely separate from any phase of adherence to the United States." (p. 802)

The power of the United States as a sovereign na-
on to cede, dispose of or otherwise relinquish its
vereignty, *nolens volens*, over parts of its territory,
gether with the inhabitants residing therein subject
American sovereignty, is not here challenged. Pre-
ming this to be an incident of sovereignty, *Jones v.*
nited States, 137 U.S. 702; *DeLima v. Bidwell*, 182
S. 1, it becomes an entirely different proposition to
sert as an incident of sovereignty the right to ex-
triate or divest of nationality, *nolens volens* (and

expel from this country)[4] nationals of the Unite States residing outside the ceded territory and withi the jurisdiction of the United States at the time c cession, because of birth within said territory.

It is appellant's contention that the rights of n tionals so situated are no different than would l those of United States citizens.

United States citizens cannot be divested of the nationality except through expatriation. The fund mental basis for expatriation is that there must be voluntary act on the part of the individual to sh his nationality. In *Perkins v. Elg*, 307 U.S. 325, 33 the court said:

> "Expatriation is the voluntary renunciation abandonment of nationality and allegiance."

To the same effect, see *Savorgnan v. United State* 338 U.S. 491, 497, 498; *MacKenzie v. Hare*, 239 U. 299.

That Congress cannot by fiat declare a loss of n tionality has been held by this court on many occ sions. In discussing that proposition the court said *United States v. Wong Kim Ark*, 169 U.S. 649, 703

> "The power of naturalization, vested in Co gress by the Constitution, is a power to conf citizenship, not a power to take it away. 'A n uralized citizen,' said Chief Justice Marshall, 't comes a member of the society possessing all t rights of a native citizen and standing, in t view of the Constitution, on the footing of a r

[4]Stripped of nationality, Congress may order the e pulsion of Filipinos for any or no reason. *United Sta ex rel. Harisiades v. Shaughnessy*, 342 U.S. 580, 5 598.

tive. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constittuion then takes him up, * * * Congress having no power to bridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, a fortiori no act or omission of Congress, * * * can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship."

It is undisputed that appellant never voluntarily nounced or abandoned his United States national- or committed any act inconsistent with the rights obligations of such nationality. It is urged by the vernment, however, that appellant and all other rsons of Filipino birth residing in this country ior to 1934, automatically lost their nationality by e treaty establishing the independence of the Philip- ne Islands.

If nationality is analogous to, and cloaked with the me protection that is accorded citizenship, then arly appellant could not be divested of his national- by that treaty, *residing as he did in this country*, an if he were a citizen. For the Philippine Independce Act of 1934 and the Treaty constituted no vol-

untary act of renunciation or self-expatriation on t
part of petitioner. He did not vote on the ratificati
of the Independence Act of 1934; nor could he ha
voted thereon so long as he elected to remain with
this country.

Is nationality, then, analogous to and protected li
citizenship? Either it is, or else it must be analogo
to alienage, for the constitution with respect to n
tionality recognizes only two categories.

The Constitution speaks of "citizens" and "natur
born citizens" of the United States in Article I a
Article II, and of "citizens or subjects" of forei
states in Article III. Before the passage of the Fou
teenth Amendment it contained no definition of ci
zen. The Fourteenth Amendment says in its openi
sentence, "All persons born or naturalized in the Un
ed States, and subject to the jurisdiction thereof, a
citizens of the United States and of the State where
they reside." The term "national" does not appe
anywhere in the Constitution of the United Stat

Because of this particularity in the language of t
Constitution, any status recognized by the law, oth
than that of citizenship or alienage, must be assimil
ed to citizenship or alienage if it is to comport w
the Constitution. Distinction may be made amo
citizens, and also among aliens, but any classes
sub-classes into which citizens or aliens may be divi
may not combine the two major and mutually exclus
classes recognized by the Constitution. Unless t
is so, the words of the Constitution are meaningl
An alien has been defined by the court in *Low W*
Suey v. Backus, 225 U.S. 460, 473, as:

"One born out of the jurisdiction of the United States and who has not been naturalized under their Constitution and laws."

he essence of this definition is birth outside of the risdiction of the United States. This is the charac-ristic which distinguishes the alien and sets him art in a class different from the citizen and national. titioner having been born under the jurisdiction of e United States, lacked this essential characteristic alienage. On the other hand, he was endowed with e positive essential characteristic of citizenship, to-t: birth within the *jurisdiction of the United States.*

Next to birth, the all-important requirement and aracteristic of citizenship is allegiance and fealty the government. And this, too, is a concomitant of tionality. Speaking of persons born in the Philippine ands, the court said in *Toyota v. United States*, *ra*, 410:

"The citizens of the Philippines are not aliens. See *Gonzales v. Williams*, 192 U.S. 1, 13. They owe no allegiance to any foreign government."

the earlier case of *Fourteen Diamond Rings v. nited States*, 183 U.S. 176, the court in referring to e Philippine Islands, said "Their allegiance became e to the United States and they became entitled to t protection," p. 179.

In the Nationality Act of 1940, 54 Stat. 1137, 8 S.C. 501(b), adopted after the Philippine Independ-ce Act, Congress equated nationals with citizens:

"The term 'national of the United States' means (1) a citizen of the United States, or (2) a person who, though not a citizen of the United States,

> owes permanent allegiance to the United Stat
> *It does not include an alien.*" (Emphasis su
> plied)

This concept, expressed in the 1940 Act was carri forward in the present 1952 law. Section 101(a)(of the Act. 8 U.S.C.A. 1101(a)(3), definies an ali to be:

> "Any person not a citizen or national of t
> United States."

and it defines a national of the United States (S tion 101(a)(22) 8 U.S.C.A. 1101(a)(22) as:

> "(A) a citizen of the United States, or (
> a person who, though not a citizen of the Unit
> States, owes permanent allegiance to the Unit
> States."

As part of his allegiance, a national is subject the duty of bearing arms and giving his life, if ne be, in defense of this country. This appellant and native born Filipinos in this country have been su ject to that duty and obligation *equally with all c zens.*

Thus, by the similarity or birth under United Sta jurisdiction; by the similarity of like allegiance to t country; by the similarity of like obligation to ser defend and safeguard this country; by the similar of the like protection due to them from this count nationals have been equated with citizens. On other hand, in no significant characteristic can th be equated with aliens. In fact, in every decision the court, where the character of nationality had b discussed, the court was sharp to point out that tionality cannot be equated with alienage. *Gonzo v. Williams, supra; Toyota v. United States, supra*

It must therefore follow, that nationality, like citenship, may not be lost, divested, forfeited or imiired without a voluntary act of renunciation or)andonment. Appellant, therefore, is still a national.

Assuming, however, that power to expatriate na)nals resides in Congress, it is not seriously connded that Congress has so acted with reference to lipinos residing in this country prior to the adoption the Independence Act of 1934. This was admitted the court in the *Cabebe* case, *supra*, when it held loss of nationality had taken place. The court said:

> "The question is not directly answered (but, as we think, it was inferentially answered) * * * *there is* no special reference of inclusion or exclusion in any of these acts to Filipinos who were no longer residing in the Islands on the date of of their independence." (p. 801)

ie court there relied upon various acts of Congress)m which it drew an inference that Congress must ve intended to denationalize Filipinos residing in e United States.

Appellant's nationality, with which he was born, and iich he has at all times maintained by unequivocal ts, may not be taken away by inference. See, *Manli v. Acheson*, 344 U.S. 133. In upholding United ates nationality in *Perkins v. Elg*, 307 U.S. 325, 337, e court said:

> "If the abrogation of that right [to elect nationality] had been in contemplation, it would naturally have been the subject of a provision suitably explicit. Rights of citizenship are not to be destroyed by an ambiguity."

The court has never been unmindful that the l
abhors forfeitures and will favor that constructi
of a statute which avoids such result. *Washingtoni
Pub. Co. v. Pearson*, 306 U.S. 30, 41; *United Sta
v. One Ford Coach*, 307 U.S. 219, 226; *Knickerboc
Life v. Norton*, 96 U.S. 234, 242. Expatriation of
pellant is a forfeiture of the nationality he obtair
by birth,—a forfeiture which deprives him of "
that makes life worth living." In a case involvi
the construction of a deportation statute, the co
said:

> "We resolve the doubts in favor of that c
> struction [avoiding deportation] because depor
> tion is a drastic measure and at times the equi
> lent of banishment or exile, * * *. It is the f
> feiture * * * of a residence in this country. S
> a forfeiture is a penalty * * * since the sta
> are considerable for the individual, we will
> assume that Congress meant to trench on his fr
> dom beyond that which is required by the narr
> est of several possible meanings of the wo
> used. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 1

If resulting deportation evoked such concern from
Supreme Court because it is a forfeiture of reside
in the United States, how much more should the cou
be concerned where an implied construction is be
used to deprive petitioner not only of his reside
but his birthright, his United States nationality.
also *Bennett v. Hunter*, 76 U.S. 326, 336.

CONCLUSION

For the foregoing reasons, it is respectfully subtted that the judgment below should be reversed.

Respectfully submitted,

A. L. WIRIN,
SARAH H. LESSER,
Attorneys for Appellant.